THE

INDIAN LAW REPORTS

(*MADRAS SERIES*).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice Devadoss and Mr. Justice Wallace.

MOKKA KONE *alias* VANNIA KONE AND TWO OTHERS, (DEFENDANTS 1 TO 3), APPELLANTS,

1927, February 8.

v.

AMMAKUTTI *alias* VANNICHI AMMAL AND ANOTHER, (PLAINTIFFS 1 AND 2), RESPONDENTS.*

Hindu Law—Custom as to exclusion from inheritance—Yadavas or Edayars—Madura Ramayana Chavadi thousand Yadavas—Sudras—Applicability of Hindu Law—Custom of exclusion of widows from inheriting to their husband by his dayadhis—Essentials and proof of custom—Nature of evidence—Instances, when sufficient—Onus of proof—Discontinuance of custom, even if once in vogue.

In the case of persons professing the Hindu religion, the Hindu Law, as expounded in the Smritis and Commentaries prevalent in the province in which the dispute arises, should *prima facie* govern the parties, though it is open to show that the Hindu Law has been either modified by custom or that particular rules have not been adopted by the community who retained in that respect their original customs; and it must be presumed that the parties are governed by Hindu Law, except in so far as they prove any custom which is at variance with it.

In order to give effect to a custom, which is set up and is at variance with ordinary Hindu Law, it should be ancient,

* Appeal No. 208 of 1922.

VANNIA KONE v. VANNICHI AMMAL.

invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy, and as regards instances in support of the custom they should be established by clear and unambiguous evidence and must be conclusive: *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*, (1872) 14 M.I.A., 570; *Abdul Hussain Khan* v. *Sona Dero*, (1918) I.L.R., 45 Calc., 450 (P.C.), and *Mira Biri* v. *Vellayanna*, (1885) I.L.R., 8 Mad., 464, relied on.

Yadavas or Edayars, who are cowherds and shepherds, are Hindus belonging to the Sudra caste, and the Madura Ramayanachavadi thousand Yadavas are a sub-sect of the Yadava caste.

Where the parties, belonging to the Madura Ramayanachavadi thousand Yadava caste, set up a custom by which the widows of a deceased last male owner, dying without issue, were excluded from inheriting to his estate but that his nearest dayadhis inherited his estate to the exclusion of his widows,

Held, on the evidence, that such a custom in derogation of the ordinary Hindu Law was not made out by such evidence as is required by law;

Held, further, that, assuming for argument's sake that in the old days there was such a custom as was set up, it had ceased to be uniform and invariable by reason of inroads made from time to time, and it was too late in the day to revive it, especially as it seems to be opposed to the present rules of equity and justice.

APPEALS against the decree of D. DANDAPANI PILLAI, Subordinate Judge of Madura, in O.S. No. 64 of 1917, and in O.S. No. 21 of 1917.

The material facts and contentions appear from the judgment of KUMARASWAMI SASTRI, J.

K. V. Krishnaswami Ayyar for appellant.

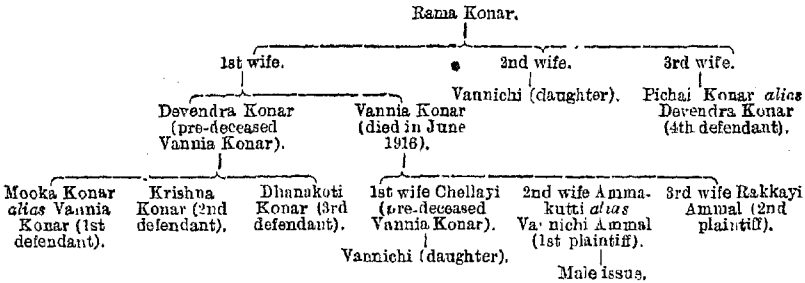
T. R. Ramachandra Ayyar for respondent.

JUDGMENT.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—These appeals arise out of two suits filed for the recovery of the estate of one Vannia Konar who was a member of a divided Hindu family and who died in Madura on or about the 27th of

June 1916. He left no sons and the claimants to the estate are his two surviving widows, his half-brother and his three nephews by a deceased brother. The following geneological table as to which there is no dispute sets out the relationship between the parties :—



On Vannia Konar's death his property is alleged to have been taken possession of by his brother's sons Mooka Konar, Krishna Konar and Dhanakoti Konar, defendants 1 to 3 in O.S. No. 64 of 1917. It is admitted that Vannia Konar was divided from his brothers. Under the ordinary Hindu Law, if it is applicable to the parties, his heirs would be his two surviving widows Ammakutti and Rakkayi. It was admitted during the course of the trial that Vannichi has a male issue. Pichai Konar who is his half-brother would, in default of any heirs of Vannia Konar, be the heir under Hindu Law as he being the nearer reversioner would exclude the sons of the deceased brother Devendra Konar. The sons of Vannia Konar's brother, Devandra Konar, however,claim the estate on the ground that, according to the custom prevailing in the community to which the parties belong, widows and daughters are excluded from inheritance and that agnates of full-blood however remote exclude agnates of half-blood. The half-brother Pichai Konar claims the estate alleging that the widows and daughters are excluded but that the agnates of half-blood who are nearer in degree exclude agnates of full-blood who are more remote.

VANNIA KONE v. VANNICHI AMMAL.

KUMARASWAMI SASTRI, J.

O.S. No. 21 of 1917 was filed by Pichai Konar, the half-brother of the deceased Vannia Konar, against Mooka Konar, Krishna Konar and Dhanakoti Konar, his nephews, claiming the estate of Vannia Konar on the ground that he as the nearer heir was entitled to the same to the exclusion of the defendants who were more remote reversioners. The widows of Vannia Konar, who claimed the estate as heirs under Hindu Law, applied to be made parties to that suit but they were referred to a regular suit and they filed O.S. No. 64 of 1917 against the half-brother and the nephews of their husband claiming possession of the estate on the ground that there was no such custom as is pleaded by the defendants excluding widows from inheritance and that under Hindu Law they as heirs would be entitled to the estate. The Subordinate Judge found against the custom set up by the defendants, whereby the widows were excluded from inheritance, and passed a decree in favour of the plaintiffs, widows. He also found against the custom pleaded by the nephews of the deceased that they though remoter heirs were entitled in preference to the brother of half-blood, but, in view of the decision of the Subordinate Judge that the widows were entitled to succeed, the said suit filed by the half-brother, O.S. No. 21 of 1917, was dismissed. Appeals Nos. 208 of 1922 and 329 of 1922 are appeals filed by the nephews of the deceased and the half-brother respectively against the decree of the Subordinate Judge in O.S. No. 64 of 1917 decreeing the widows' claim, and Appeal No. 328 of 1922 is the appeal filed by the half-brother against the decree dismissing his suit O.S. No. 21 of 1917.

The question to be decided in these appeals is whether the custom which is set up by the defendants in O.S. No. 64 of 1917 as to the exclusion of widows and

the custom which is set up by the defendants in O.S. No. 21 of 1917 whereby agnates of half-blood are postponed to agnates of full-blood even though more remote have been proved. It will be seen that, while the brother and the nephews of Vannia Konar agree that the widows are excluded, they are in conflict as to whether the rule of Hindu Law that nearer agnates exclude agnates more remote is applicable. Both the suits were tried together but as there is some confusion as to what exactly is the custom which is pleaded, I think it is desirable to set out the custom which the half-brother and the nephews set up.

* * * * *

It is clear from the pleadings that both the half-brother and the nephews of the deceased agree that when a man dies issueless the estate passes to his nearest *dayadis* or agnates to the exclusion of the widow and daughter. The right of the widow is only to receive the *Aruppucooli* or *Kaimpenkur*, the amount of which is 100 sheep or Rs. 100, should there be no sheep to be delivered, irrespective of the value of the estate left. Nothing is said as to what the daughters get; but the evidence adduced on behalf of the defendants is that the daughters have to leave the father's house and go to the house of their maternal uncle whose duty it is to get them married and they have no claim on their father's estate even for maintenance or marriage expenses or residence. Some witnesses go to the extreme length of saying that even where there is no maternal uncle able to protect them, they have no claim to their father's estate and they should throw themselves under the protection of the King. There is nothing said about the rights of the daughters' sons who would succeed under Hindu Law in default of widow or daughters but having regard to the fact the custom alleged makes the next

VANNIA KONE v. VANNICHI AMMAL.

KUMARASWAMI SASTRI, J.

agnate inherit and vests the estate in him there could be no divesting and the daughters' sons are by necessary implication also excluded. The pleadings are also silent as to what is to become of the mother who would be the heir under the Hindu Law in default of widow or daughter or daughter's son. But the evidence adduced is that the mother also is excluded. In fact the witnesses state that all female relations are excluded.

As regards the *Aruppucooli*, though in the pleadings it is limited to 100 sheep or Rs. 100 irrespective of the value of the estate, the witnesses called by the defendants in the suit filed by the widows are not agreed on the fixed rule pleaded, and the amount to be given ranges from Rs. 30 to Rs. 100. Some of the documents filed also do not show that there was any inflexible rule as to the number of sheep or the amount to be paid in default to the widow. The evidence also is that *Aruppucooli* is to be given by the *dayadis* even though the husband left no property. Some of the witnesses also state that if a man leaves more than one widow, each widow gets 100 sheep or Rs. 100 irrespective of there being property sufficient to pay *Aruppucooli* to each widow. It is also stated that *Aruppucooli* is to be paid even though the husband was a member of a joint family. So far as *Aruppucooli* or *Kaimpenkur* is concerned it is clear from the evidence that there is no definite rule or custom as to the amount. The Subordinate Judge deals with the evidence in paragraph 76 of his judgment. As it was conceded by the appellants' vakil during the course of the argument that the evidence, oral and documentary, does not show any uniform rule, I need not discuss the evidence on this point. The custom pleaded is in direct opposition to the rules of Hindu Law of Inheritance for while under the ordinary Hindu Law the widow, the daughter and

in their default the daughter's sons would take the property of a sonless and divided Hindu, according to the custom set up they are excluded in favour of agnates however remote; and whereas under the Hindu Law widows and unmarried daughters would be entitled to maintenance and residence and unmarried daughters to marriage expenses out of the estate of the deceased, according to the custom set up the widows get only 100 sheep or Rs. 100 whatever may be the magnitude of the estate of the husband and the daughters get nothing at all. Although in this case the daughter of the deceased is not a party and any decision here would not bind her, still it is necessary to consider the position of the daughter as it is an integral part of the custom pleaded excluding the widow and the question is whether such a custom has been proved. A number of witnesses were examined on both sides and each party has let in evidence as to instances either in support of or denying the custom. The Subordinate Judge has found against the custom. The case has been argued at very great length before us and I am of opinion that the custom has not been proved.

It is admitted that the parties belong to the Yadhava or Shepherd community. They form a subdivision of that sect and are known as the Madura Ramayana Chavadi thousand Yadhavas who reside chiefly in the town of Madura and about 56 adjoining villages. Though the community is known as thousand Yadhavas, probably meaning that originally there were 1,000 families, the evidence is that there are about 700 families now constituting the community. This community is again subdivided into three sub-sects, viz., Puthunattu Edayars, Sivikara Edayars and A. Edayars. Although all these three sub-sects go by the name of the Madura Ramayana Chavadi thousand Yadhavas and although they all contribute to the caste panchayat which is situate in

VANNIA KONE v. VANNICHI AMMAL.

KUMARASWAMI SASTRI, J.

a place called Ramayana Chavadi in Madura and although all these three sub-sects are within the jurisdiction of this caste panchayat which settles their caste affairs, inter-marriage between them is prohibited. The *Panchayat* consists of a manager called Nattamakkar and 24 Pattikars or members of the *Panchayat*. This community claims to belong to the larger community called the Yadhavas or the Shepherd community.

The Yadhava community or the community of cowherds and shepherds is a very ancient one and is mentioned in the great Epic Mahabharatha. In fact Sri Krishna was a member of that community. It is, however, doubtful whether the cowherds and shepherds of Southern India can claim descent from the Yadhavas of Northern India as identity of trade or occupation can hardly be a sound basis for determining identity of stock especially where cattle and sheep breeding is an occupation not exclusively Aryan. The probability is that the Yadhavas of Southern India belong to the original Dravidian stock who, like other inhabitants of Southern India, came under the influence of the Aryan conquerors and who were absorbed into the Hindu community though they retained some of their original customs too deep-rooted to be supplanted by Aryan influences. There can be little doubt that some of their aboriginal deities were absorbed into the Hindu Pantheon and that in the process of assimilation which has gone on for several centuries the original inhabitants of Southern India took their place in and subjected themselves to the laws and usages of the Aryans. In the Census Report the Yadhavas or Edayars are classed as Sudras which is the fourth subdivision of the Aryan caste system and there can be little doubt that the Yadhavas should be classed as Hindus belonging to the Sudra caste.

The question as to how far the Hindu Law as expounded in the Smritis and Commentaries is to be applied to the Dravidian and other communities of non-Aryan descent is one which has given rise to a lot of controversy. Some of the earlier Judges and Jurists thought it unreasonable to apply the Hindu Law to them as the whole scheme of Hindu Law was based upon religious and spiritual considerations alien to the thoughts, habits and culture of the original Dravidian inhabitants of Southern India, while others were of opinion that, in view of the centuries that have elapsed between the conquest of Southern India by the Aryans and the assimilation that has been going on, the Hindu Law should be applied except in cases where there is clear proof of custom to the contrary. I think it is too late in the day to contend that, in the case of persons professing the Hindu religion, the Hindu Law as expounded in the Smritis and Commentaries prevalent in the province in which disputes arise should not *prima facie* govern the parties, though it will always be open to show that such Hindu Law has been either modified by custom or that particular rules have not been adopted by the community who retained in that respect their original customs.

I may point out that in the present case the parties and the witnesses give their religion as Vaishnavite, their caste as Yadhava and it is not suggested that they do not follow the Hindu religion. I may also point out that defendant's forty-sixth witness, Ayya Kone, who belongs to the thousand Yadhavas community, states that at the time of the annual ceremony he would mention the names of his father, grandfather, and great-grandfather, and that when his father performed sradh ceremonies he used to mention the names of his ancestors. So that this community performs sradh ceremonies to the deceased ancestors-

VANNIA KONE v. VANNICHI AMMAL.

KUMARASWAMI SASTRI, J.

which forms an important basis in the Hindu Law of Inheritance. It is not suggested that though the Yadhava community is a large community in Southern India and although ethnologically the sub-sect to which the parties belong, namely, the Madura Ramayanachavadi thousand Yadhavas are not different from the other Yadhavas in Madura, Rāmnād and Tinnevelly districts, other Yadhavas adopt the custom as to succession now set up. What is sought to be proved is that this subsect confined to about 700 families in the Madura Town and surrounding villages follow the rule of exclusion of females. I may state that another section of the Yadhavas tried to set up the rule of exclusion of females but this was negatived in both the lower Courts and was confirmed in the High Court in Second Appeal No. 1413 of 1922. There is nothing to show that the Yadhava community has its own self-contained written system of inheritance to which recourse is to be had in dealing with such questions. According to the brother's sons of the deceased (defendants 1 to 3) and the half-brother of the deceased (fourth defendant) the Hindu Law is applicable except in so far as they say it has been modified by the custom of the caste. The fourth defendant would have it that the rule of Hindu Law that nearer agnates would exclude the ones more remote is applicable to the parties while this is denied by defendants 1 to 3. I think it has to be presumed that the parties are governed by Hindu Law except in so far as they prove any custom which is at variance with it.

It has been held in numerous decisions both of the High Courts and the Privy Council that in order to give effect to a custom which is set up and which is at variance with the ordinary Hindu Law it should be ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality

or public policy and as regards instances in support of the custom they should be established by clear and unambiguous evidence and must be conclusive.

In *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(1) their Lordships of the Privy Council at page 585 observe:

"Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

This case was referred to with approval by their Lordships of the Privy Council in *Abdul Hussein Khan* v. *Sona Dero*(2). As regards the evidence being clear and conclusive and not explainable their Lordships in that case cite with approval the decision of the Madras High Court in *Mira Bivi* v. *Vellayanna*(3). The following observations of the learned Judges (Sir CHARLES TURNER, C.J., and HUTCHINS, J.) will be relevant in reciting the evidence in this case. They observe:

"It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored or they have been allotted maintenance, though the cases mentioned by the Judge of a partition in the father's lifetime are not inconsistent with Muhammadan Law. There are also cases in which married daughters have been treated as estranged from the family."

But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Muhammadan Law. Indeed, in many parts of the

(1) (1872) 14 M.I.A., 570. (2) (1918) I.L.R., 45 Calc., 450.
(3) (1885) I.L.R., 8 Mad., 464.

VANNIA KONE v. VANNICHI AMMAL.

KUMARA-SWAMI SASTRI, J.

country it is unusual for Muhammadan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves, and when they are married, the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Muhammadan females are so much under the influence of their male relations, that the mere partition of the property among the males without reference to them cannot count for much.

In *Ramakanta Das Mohapatra* v. *Shamanand Das Mohapatra*(1), where the question was whether the custom of primogeniture was proved and it was found that whenever the holder of an estate left more than one son the right of the eldest son was challenged in Courts and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which had the custom existed they would have been entitled, their Lordships of the Privy Council observe:

> "The evidence entirely fails, in their Lordships' opinion, to give to the alleged custom the character of certainty which is essential to its validity."

I shall refer to this case again in dealing with instances connected with proceedings in Court. In *Hurpurshad* v. *Sheo Dyal*(2), their Lordships of the Privy Council observe at page 285:

> "A custom is a rule which, in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and, being in derogation of the general rules of law, must be construed strictly."

In *Rama Nand* v. *Surgiani*(3), Sir JOHN EDGE, C.J., and BURKITT, J., referred to the fact that the instances

(1) (1909) I.L.R., 36 Calc., 590. (2) (1876) 3 I.A., 259.
(3) (1894) I.L.R., 16 All., 221.

which are cited to prove a custom should be instances which should not be explained otherwise than by the fact that the custom exists. Their observations at page 223 are in point. I may also refer to *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*(1), where it was held by Sir CHARLES SARGENT, C.J., and BIRDWOOD, J., that even two cases against the custom set up which occurred several years ago and which were acquiesced in by the members of the community and not impugned in Court would be sufficient to outweigh a number of instances to the contrary and as showing that there was not a uniform and persistent usage moulding the custom of the caste.

Before dealing with the evidence as to instances adduced on both sides, I think certain general observations should be made in dealing with the evidence of custom in this case. We find no cases where a *Dayadi* went to Court to establish his claim although in some instances the widow took her husband's property and dealt with it. Although it is said that there was a caste *panchayat* which settled caste questions, there is no decision of any *panchayat* which upholds the custom which is now sought to be established. There was a *panchayat* regularly held in the Ramayanachavadi; contributions were levied from the castemen and it is not suggested that the *panchayat* is not now functioning. If there was this invariable custom which was given effect to by the *panchayat*, there would be something in the records of the *panchayat* to show this. It is stated that the person in charge of the *panchayat* records was *subpœnaed* and that he came to Court and said that he had not got the records. I find it difficult to see why

(1) (1892) I.L.R., 16 Bom., 470.

VANNIA KONE v. VANNICHI AMMAL.

KUMARASWAMI SASTRI, J.

steps were not taken as provided for in the Code to compel the production of the records. The *panchayat* is a public body and the Code gives ample powers to the Court by arrest, imprisonment and attachment of property to compel the production of documents. I may also state that no *pattas* or other documents are produced to show the enjoyment of property by agnates to the exclusion of widows. Though *pattas* may not be evidence of title, they are certainly evidence as to possession, as the revenue authorities issue *pattas* to those in possession. There are also kist receipts which would show who paid the kist but no such receipts have been produced in any instance. The Revenue registers could also have been produced to show who was in possession and also the mutation of names.

In dealing with the evidence, one has to bear in mind that before instances cited by the defendants can be considered as proving the custom alleged, it has to be shown that the person, whose estate is in question died as a member of a divided family, as otherwise even under the ordinary Hindu Law female relations would be excluded in preference to the undivided co-parceners. This is conceded by all the parties, so that the onus is on the person alleging the custom of showing by clear proof that the instance cited is the instance of a divided person. It is only in such cases that the taking of the property by the agnate would prove the exclusion of the widow or the daughter and this is the custom set up. There are several instances of the plaintiffs where there is nothing but the statement of a single witness to show that the instances cited refer to a person who is divided. The ordinary presumption of law is that a person is undivided and the onus is on the party alleging it to prove division, and if in cases where such instances can be proved by documentary evidence, for example,

partition deeds, *pattas*, separate kist receipts or the separate transactions of the various members and no documents are produced or if in cases of oral partitions, the members of the family who divided or the widows concerned who are said to have been excluded are not, if alive, examined, and if the only evidence is the statement of a person not connected with the family or of a distant relation that the deceased was a divided member, I do not think I can hold that such instances have been proved. Although it may not be necessary to prove each instance as if that particular instance related to a suit which raised the issue of partition between the various co-parceners, I think there should be such proof as would reasonably satisfy the Court that the case which is cited is that of a person who is a member of a divided family.

As regards *Aruppucooli* I have already stated that according to the evidence it was payable to all widows whether the family was divided or undivided and whether the husband had or had not property. The rate of *Aruppucooli* also was not as pleaded a uniform amount payable and the documents show that it varied from Rs. 30 to Rs. 100. Mere proof that *Aruppucooli* was paid would not therefore by itself afford any guidance.

[His Lordship then dealt with the documents and the oral evidence as to instances of exclusion of widows from inheritance and proceeded as follows :—]

Great reliance was placed upon a statement in the "Madura District Gazetteer" and in Dr. Thurston's book "Castes and Tribes of Southern India" that in the community to which the parties belong widows were excluded. We find in the "Madura District Gazetteer" the following statement

"Among those Puthunattars an uncommon rule of inheritance is in force. A woman who has no male issue at the time of her husband's death has to return his property to his brother,

VANNIA KONE v. VANNICHI AMMAL.

KUMARASWAMI SASTRI, J.

father or maternal uncle but is allotted maintenance, the amount of which is fixed by a caste *Panchayat*."

The custom which is set up here is different from that which the defendants want to establish in this case. It is not the general custom that agnates exclude all females however remote but that after the husband's death if he leaves a brother or father, the property is to go to those two persons and maintenance is to be given to the widow. The statement in the above passage that the maternal uncle is to get the property is opposed to the custom now set up as cognates have no place in the custom pleaded by the defendants. There is also nothing here to show whether daughter's son is also to be excluded if the person left a daughter's son. No doubt the statement in "the Madura District Gazetteer" deserves great weight, but I do not think it should be taken as conclusive especially where the evidence in the case does not support a uniform custom set up.

[His Lordship then referred to certain affidavits filed in the case and continued as follows:—]

It is argued by Mr. Ramachandra Ayyar that the custom set up is unreasonable inasmuch as the widow, whatever may be the property of her husband, has to leave the house on receipt of 100 sheep or Rs. 100, unmarried daughters are left destitute and dependent on the mercy of their maternal relations not even receiving maintenance till they attained age or any money for their marriage expenses and daughter's sons are totally excluded in favour of agnatic relations, however remote. I do not think we can reject a custom if it is otherwise proved. It should be remembered that the position of woman in the line of heirs under Hindu Law was one of slow and laborious growth, and that in the early stages of the Aryan community woman found no place in succession. Even under the

Hindu Law, the sister was till recently excluded from inheritance altogether and sister's son only came in after his rights were negatived in more than one decision. These persons who would be nearer heirs according to modern conceptions had been excluded for centuries in favour of remote kinsmen. A person looking at the Hindu Law of Inheritance from a western standpoint would probably look at it with a mixture of wonder and pity especially when he forgets that the keynote to the system of inheritance is the capacity to benefit the soul of the deceased by offering funeral oblations. It is very probable that when the community was in a nomadic state and the sole occupation was to rear cattle and sheep, women by reason of their incapacity to carry on the occupation were excluded from inheritance, but as time went on and the primitive occupation was no longer the source of income for several persons, as these shepherds settled down in towns and villages and acquired property and were surrounded by persons who followed the Hindu Law of Inheritance and Succession, they began to adopt the ordinary rule of Hindu Law of Inheritance. Assuming for argument's sake that in the old days there was such a custom as is now set up it has ceased to be uniform and invariable by reason of inroads made from time to time and I think it is too late in the day to revive it especially as it seems to me to be opposed to the present day rules of equity and justice.

The evidence in my opinion shows that there have been instances both ways but the defendants' evidence falls far short of the standard required to prove a custom in derogation of the ordinary Hindu Law.

In the result Appeals Nos. 208 and 329 of 1922 are dismissed with costs. As regards printing costs defendants have to pay, they will be divided between

VANNIA KONE v. VANNICHI AMMAL.

KUMARASWAMI SASTRI, J

defendants 1 to 3 on one side and 4th defendant on the other.

As regards Appeal No. 328 of 1922, in view of my finding that the custom excluding widows has not been proved, it is not necessary to find whether there is a custom excluding half-brothers in favour of nephews of full blood. As the Hindu Law applies and as the deceased has left widows, daughter and daughter's son, the question raised in this suit is purely speculative and I do not see any ground for deciding which of the two sets of reversioners who have at present merely a *spes successionis* and who may not at all have any rights in the estate are entitled to precedence. I may also state that the daughter is not a party to any of these suits and no adjudication between the two sets of reversioners would be of any use when the estate opens on the death of the widows. Under these circumstances the appeal is dismissed but without costs throughout.

DEVADOSS, J. DEVADOSS, J.—[After setting out the pleadings in the case, His Lordship proceeded:]

The issue is—

"Whether females are excluded from inheritance by the custom of the caste to which the parties belong as contended by the defendants."

A good deal of argument has been addressed to us by Mr. Ramachandra Ayyar who appears for the widows about the burden of proof of a custom opposed to the ordinary Hindu Law and about the essentials of a valid custom.

In deciding whether a certain custom relating to marriage, divorce, adoption, inheritance or succession obtains among a caste, sub-caste, class, sect or clan, the following considerations have to be borne in mind. What is ordinarily understood as Hindu Law is not the customary law of the country like the common law of

England. Neither is it a Statute law in the sense that some King or Legislature framed the law and enforced its acceptance by the people. The Hindu Law as is commonly understood is a set of rules contained in several Sanskrit books which the Sanskritists consider as books of authority on the law governing Hindus. There are several treatises on law and they are not of equal authority in all the provinces. Many of the so-called provisions of law are only moral or ethical rules for the conduct of a community which found a resting place amidst strange surroundings and amongst people differing considerably in many respects from it. The inhabitants of the southern portion of India were Dravidians of Turanian origin and not of the Aryan stock. The term "Dravidian" is applied generally to the South Indian people. The Dravidians were a highly civilized people with languages and literatures of their own long before the Christian era. Tamil was a highly cultivated language long before the Aryans came down south as is apparent from the absence of Sanskritic influence in the most ancient of the Tamil works extant. Consequently though the Aryans peacefully penetrated into the country and in course of time acquired considerable influence over the people posing as priests and gurus, yet they were not able to alter the customs and manners and mode of worship which prevailed among the people to any appreciable extent. Mayne says:

> "We also know that the influence of Brahmins or even of Aryans, among the Dravidian races of the south has been of the very slightest, at all events, until the British officials introduced their Brahmin advisers."
>
> Hindu Law and Usage, 8th Edition, page 50.

What little influence they really exerted over the people could be gathered from the fact that the people retained their own customs and manners and worshipped

VANNIA KONE v. VANNICHI AMMAL.

DEVADOSS, J.

their own Gods and Goddesses. The Aryans in Southern India, instead of changing the customs and manners of the people, adopted some of their customs as their own. As the Gods and Goddesses worshipped by the Dravidians were not those of the Aryans, the latter in order to influence the people for their own benefit created a pedigree for them and made out they were the sons and daughters of their Gods and Goddesses. As regards marriage, divorce and inheritance and social and domestic relations, the people followed their own customs, though they were willing to worship the Gods and Goddesses of the Aryans without forsaking their allegiance to their demon Gods and Goddesses; and the rules embodied in the Sanskrit law books were never accepted by the people as the law governing their relations.

During the Hindu period there was no attempt to force upon the people any general system of law as regards social and domestic relations and inheritance and succession. History does not tell us that during the period of the Muhammadan domination the rulers interfered with the customary laws of the people. Each caste, class and clan had its own peculiar customs governing their social and domestic relations, inheritance and succession to property. After the advent of the British rule, the Judges appointed by the East India Company, who were obviously ignorant of the customs and manners of the people, looked for guidance to the learned men among the people in deciding questions regarding succession, inheritance, etc. The learned men or pandits naturally relied upon the rules contained in the old Sanskrit works for their opinion. As observed by Mr. Mayne "upon all disputed points of law the English Judges were merely the mouthpieces of the pandits who were attached to their Courts and whom

they were bound to consult"—Mayne's Hindu Law, 8th Edition, paragraph 40, page 43. The English Judges who gave their decisions according to the opinions of the pandits when not opposed to natural justice came to look upon the Sanskrit works as embodying the law applicable to the people of the land; and a custom not in accordance with the rules contained in the books came to be considered as an exception to the general Hindu Law.

The term "Hindu" is applied indiscriminately to all people who are not Muhammadans or Christians. The lowest castes who are outside the pale of Hinduism proper, are also called Hindus. To call all the people "Hindus" and then apply the Hindu Law contained in the Sanskrit books to all of them is the natural consequence of the ignorance of those to whom the administration of Civil Justice was committed in the early part of the last century. It is now settled by a long course of decisions that the Hindu Law as understood by the Judges and the legal profession is applicable to all Hindus and a custom not in accordance with the general Hindu Law has to be proved by the party setting it up. But, in considering the proof of such a custom, the Court should not labour under the impression that the custom pleaded is a conscious departure from or variation of the Hindu Law applicable to the parties. The custom is not an exception to the general Hindu Law as if a set of persons who were governed by the Hindu Law agreed to adopt a course of conduct in variance with the law which governs them. The customs obtaining amongst the Non-Aryan races of this Presidency, especially amomg those inhabiting the Southern or Tamil Districts, have been in vogue from time immemorial. To hold such customs as exceptions to or variation of the Hindu Law is to ignore

VANNIA KONE v. VANNICHI AMMAL.

DEVADOSS, J.

History and Ethnology; for, the Dravidians were never governed by the Hindu Law and they adopted only some of the customs and manners of the Aryans when they wanted to imitate them. In weighing the evidence as regards any custom which is set up, the Court should consider whether the caste or sect or clan among whom it is said to prevail ever adopted wholly or only with some reservations the general body of Hindu Law and whether they ever intended to alter their customs and customary laws completely. Dr. Burnell in his introduction to the Dayavigabha, page 15, observes:

> "Custom has always been to a great extent superior to the written law in India and especially so in the south, but the Indian Jurists never attempted to record such merely human details; hence the difficulty of the law of marriage and caste usages on which questions of inheritance often depend. By custom only can the Dharma Sastra here be the rule of others than Brahmins, and even in the case of Brahmins it is very often superseded by custom."

The parties to the appeals are Edayars or shepherds by caste. They call themselves Yadhavas. Many of them profess to be Vaishnavites and wear their distinctive marks. Though the Madura Edayars are not Aryans, yet they have arrogated to themselves the position of the caste in which the great Avatar of Vishnu, Krishna, was born, and consequently, have adopted the customs and religious practices and usages of the Aryans. D.W. 46 says that they perform the Shradhas and repeat the names of their ancestors during the ceremony. A mere conversion to a religion would not necessarily involve the adoption of the laws as to inheritance and succession obtaining among the adherents of that religion. As observed by Mr. Nelson in his brochure on Hindu Law entitled a "View of the Hindu Law as administered by the High Court of Judicature at Madras" at page 138:—"If all professed

one and the same religion, that fact would not in itself warrant the supposition that all followed the same customs in respect to succession to property and the like; for whilst nearly all the countries of Europe profess the Christian faith, each has its own peculiar laws regulating the devolution of property and other affairs." But when the converts aim at identifying themselves with the rest, strong evidence would be needed to show that they kept their own laws relating to social relations, marriage, inheritance and succession uninfluenced by the rules of law obtaining among the adherents of the religion to which they became converts.

No hard-and-fast rule can be laid down as to how many instances are sufficient to make out a valid custom and how many exceptions to the custom set up would make the Court hold that the custom pleaded is not obligatory or invariable. Where a custom is a general one obtaining in a caste or clan composed of hundreds of families, the Court would naturally expect a large number of instances in proof of the custom, but, where the custom set up is that of a single family or a small group of families, it is unreasonable to expect a large number of instances in support of the custom. Where a large number of instances are proved which are not in accordance with the custom, even though the number of instances produced in support of the custom is considerably larger, the Court would hesitate a good deal before coming to the conclusion that the custom is considered by the people among whom it is said to prevail as obligatory. It is unnecessary in this view to consider the cases relied upon by Mr. Ramachandra Ayyar such as *Mira Bivi* v. *Vellayanna*(1), and *Abdul Hussain Khan* v. *Sona Dero*(2).

(1) (1885) I.L.R., 8 Mad., 464. (2) (1918) I.L.R., 45 Calc., 450.

VANNIA KONE v. VANNICHI AMMAL.

DEVADOSS, J.

The first question is, what is the custom that is set up? The issue as framed is "Whether females are excluded from inheritance by the custom of the caste to which the parties belong as contended by the Defendants"? is too wide. When the case was opened by Mr. K. V. Krishnaswami Ayyar for the fourth defendant, I asked him how he would formulate his position. He replied that women are excluded from inheritance. His statement is in keeping with the issue, but the written statements of defendants 1 to 3 and the fourth defendant do not go that length. In paragraph 2 of the fourth defendant's written statement, the custom is pleaded in the following terms: "Widows do not inherit their husband's property, but are entitled only to a small perquisite, the succession in the absence of a son opening to the nearest male *dayadis*." Defendants 1, 2 and 3 plead in paragraph 4 "Sonless widows possess an interest in the inheritance only to the extent of the customary allowances, namely, 99 sheep if the owner died possessed of the same or at Re. 1 per sheep for every sheep that remains undelivered."

We cannot consider the custom with reference to the right of a mother to succeed to her son dying leaving no widow or issue, or the right of a daughter to the estate of a father dying without male issue or the right of a grandson by a daughter in the absence of male issue to inherit to the maternal grandfather, as they are not before us; and the question has not been definitely raised with reference to them, though witnesses in their anxiety to make out the defendants' case are prepared to go the length of saying that if a man dies without male issue his estate immediately vests in his agnates. The custom for determination in this case should only be confined to that set out in paragraph 2 of the written statement of the fourth defendant, namely, widows do not

inherit their husband's property but are entitled only to a small perquisite.

It is urged by Mr. Ramachandra Ayyar that a finding that widows do not inherit to their husbands dying without male issue would necessarily mean the vesting of the property in the nearest agnate and that would prejudice the right of a daughter to inherit to a father and the right of the daughter's son to inherit to the grandfather, for property must vest in somebody and if it vests in the agnate, it cannot be subsequently divested in favour of the daughter or of the daughter's son. A finding on the custom need not necessarily prejudice the right of the daughter or daughter's son as it is confined only to the right of the widow to inherit to her husband.

It is next urged that the custom is an unreasonable one. Nothing is unreasonable in a custom which places widows under a disability to inherit to their deceased husbands. In considering whether a custom is reasonable or unreasonable, we should not be influenced or guided by modern ideas, for, that which appears to be unreasonable to us now may have been considered as eminently reasonable and necessary for the growth or well-being of a caste or clan in bygone ages. In ancient times women were considered as chattel and therefore not fit to own property in their own right. Even Manu who gives women the right of inheritance in certain cases places them under a perpetual tutelage :

> "In childhood must a female be dependent on her father ; in youth on her husband ; her lord being dead, on her sons ; if she have no sons, on the near kinsmen of her husband ; if he left no kinsmen, on those of her father ; if she have no paternal kinsmen, on the sovereign ; a woman must never seek independence."
>
> Manu, Chapter V, verse 148.

It is only in recent times that women were considered fit to own property in their own right. The

VANNIA KONE v. VANNICHI AMMAL.

DEVADOSS, J.

right to inherit to male relations is a still more modern development of the law. The earliest recorded instance of daughters claiming a share for themselves in their father's property is that of the daughters of Zelophehad who applied to the great Law-giver, Moses, to be allowed to succeed to their father who died leaving no sons on the ground that his name should not "be done away from among his family, because he has no son". Moses allowed them to take their father's property and decreed,

> "If a man die and have no son then he shall cause inheritance to pass unto his daughter . . . and it shall be unto the children of Israel a statute of judgment."

The Book of Numbers, Chapter 27, verses 4 and 8. This became "law" in Israel. Everafter that, in the absence of sons, the daughters divided their father's property among themselves. Under the Muhammadan Law a mother and a wife are given definite shares and a daughter is a residuary and a sister is a sharer or a residuary according to circumstances. Till the passing of the Married Women's Property Act of 1884, a married woman could not own separate property in England. According to the Mitakshara a sister is not an heir at all, though she is an heir in the Bombay Presidency under the Mayukha Law. So, there is nothing unreasonable in a custom which prohibits a wife from inheriting to her husband. If we apply the present day notions to some of the rules of Hindu Law, we should certainly condemn them as unreasonable and unsuited to modern conditions, but as they are binding on the people, Courts are bound to recognize them and to give effect to them.

The parties to the appeals are a subdivision of Shepherds called Pudhunattu Edayars or Ramayana Chavadi Yadhavas. They are also called One thousand

Shepherds and they number about 700 families. The custom by which sonless widows are excluded from inheritance is said to obtain among this Ramayana Chavadi Yadhavas. In giving evidence the defendants' witnesses depose that the widows get what is known as *Aruppucooli* or *Kaimpenkur* of 100 sheep or 100 rupees and quit the house of their husbands. If the payment of *Kaimpenkur* or *Aruppucooli* is a part and parcel of the custom which excludes widows from their husband's inheritance, I may say at once that the custom has not been made out; for, the evidence as to the amount, time and mode of payment of *Aruppucooli* is so conflicting and unsatisfactory that it is not possible to arrive at any definite decision as to its amount or the time or mode of payment. Even though the witnesses treat the payment of *Aruppucooli* as part of the custom and inseparable from the portion relating to the exclusion of the widows from inheritance, yet as the defendants should not be made to suffer on account of the attempt of the witnesses to prove too much, I addressed myself to the simple question, have the defendants made out by reliable and unambiguous evidence a custom which is invariable and obligatory whereby widows are debarred from inheriting their husband's property? The appellants seek to establish the custom by adducing a number of instances in which the property of a person dying without male issue was inherited not by the widows but by the agnates or *pangalis* . . .

Indian Courts are Courts of Law as well as of equity, and they ought not to give effect to a custom which the growing consciousness of the community in which it is said to have prevailed is prepared to treat as unsuited to modern conditions and from which it has allowed a departure in several cases. When a custom

VANNIA KONE v. VANNICHI AMMAL.

DEVADOSS, J.

which is not in accordance with the ordinary law governing the Hindu community is giving way to enlightenment in order to bring it in line with other communities, Courts would not be justified in giving effect to it and thereby compelling the unwilling community to be bound by the custom which it has practically abandoned. The judicial recognition of a custom which a community is prepared to jettison is neither necessary nor just. Even if such a custom as that set up had prevailed at some time, I am not prepared to hold that the custom has been considered to be a binding one during the last 20 or 25 years. . . .

After careful and anxious consideration of the whole of the evidence in this case, I have not the slightest hesitation in holding that the defendants have failed to prove the custom as set up by them and I find issue No. 1 against the defendants. The result of this finding is, the appeals against the decree in O.S. No. 64 of 1917 fail and they are dismissed with costs. It is unnecessary in the view I have taken of issue No. 1 to consider the issues that arise in O.S. No. 21 of 1917. Appeal No. 328 of 1922 is also dismissed without costs throughout.

WALLACE, J.

WALLACE, J.—I concur with my learned brothers.

The point for decision is whether the defendants have proved a custom in derogation of Hindu Law that the agnates to the remotest degree exclude the sonless widow or widows of a deceased divided member of the 1,000 Yadhava caste community, in the matter of inheritance of his property at his death. It has not been contended before us, although it was contended in a way before the lower Court, that the parties to these suits are not Hindus. They are certainly Hindus by religion. They describe themselves as Vaishnavites and do not claim that they follow any other religion.

That being so, it is difficult for them to contend that they are not in the matter of family law of inheritance governed primarily by Hindu Law and in fact that has been admitted in this Court. In their pleadings also they admit that they are governed primarily by Hindu Law, but plead the suit custom, which is a custom in derogation of the ordinary law of succession under Hindu Law, as a custom among them having the force of law and therefore to be enforced by the Courts. The onus of proving such a custom lies heavily on the defendants and it was necessary for them to prove that the custom alleged is certain, uniform and ancient, and forms in the caste consciousness such a binding rule that disobedience of it will be felt by the caste as tantamount to disobedience of a positive law.

The evidence to prove the custom is voluminous and deals with a large number of separate instances, each of which had to be carefully extracted and dealt with by the trial Court. This may partly account for the lower Court having made many mistakes in quoting it, although there are also indications that these mistakes are due to the Judge not reading the evidence for himself but to his depending upon the Vakil's notes of argument. Speaking generally, however, the evidence is not of a high order, is more conspicuous for quantity than for quality, and is vague, indefinite and inconclusive. It is a sounder policy in such cases to put forward a reasonable number of unmistakeable instances of a custom clearly and definitely proved than any number of vague and indefinite instances insufficiently established.

[His Lordship then dealt with the pleadings and the instances for and against the custom and proceeded as follows :—]

Such is the state of the evidence as I find it to be in this case. Regarding it as a whole and remembering

VANNIA KONE v. VANNICHI AMMAL.

WALLACE, J.

that the onus of proving a custom derogatory to Hindu Law lies heavily on the defendants, I am satisfied that they have not discharged it. The custom mentioned in the Gazetteer is not the custom set out in the pleadings. The custom set out in the pleadings of defendants 1 to 3 is not the custom set out in the pleadings of the fourth defendant. The custom set out in the pleadings by all defendants is widely expanded and carried to absurd lengths in the evidence. The few instances which defendants have proved of *dayadis* excluding widows are to my mind wholly insufficient to establish that any clear, uniform, ancient and definite custom contrary to the ordinary Hindu Law and having the force of law governs the consciousness and the social life of this caste. As I have indicated there may at one time have been a custom such as is set out in the Gazetteer which is now in a state of flux and erosion owing to the inroads of Hindu Law. It is easier to conceive that there was once such a custom which has now fallen very much into desuetude owing to the influence of Hindu Law than that a definite custom was set up in defiance of Hindu Law by persons originally subject in this matter to the full canon of Hindu Law. I am unable to conclude that there is now in vogue any custom such as the defendants contend for having the force of law so that the community regard it as law and a breach of it as a breach of the law. I therefore agree with the lower Court and with my learned brothers that this custom has not been proved, that the defence to the plaintiffs' claims fails, and that the appeals should be dismissed with costs, as provided for in my learned brothers' judgment.

Appeal No. 328 *of* 1922.

I agree here also with the order in this appeal.

K.R.